



# Ministry of Housing, Communities & Local Government

## **GOVERNMENT FUNDS FOR THE REPLACEMENT OF UNSAFE CLADDING ON HIGH-RISE BUILDINGS (BUILDING SAFETY FUND / PRIVATE SECTOR CLADDING REMEDIATION FUND)**

### Guidance on Subsidy Control for Applicants

#### **Introduction**

The Government is committed to ensuring that residents are safe and feel safe in their homes. Therefore, the Government has established the Private Sector ACM Cladding Remediation Fund (PSCRF) and the Building Safety Fund (BSF) to remove unsafe Aluminium Composite Material (ACM) and non-ACM cladding systems from residential buildings of 18 metres and over. Funding will be provided to responsible entities who will be responsible for remediation, but the fund(s) will be for the benefit of leaseholders who would otherwise incur the cost through service charge provisions. In some cases, the relevant leaseholder may be a sub-leaseholder - please see the section headed Declarations and Subletting below.

As described in the full application guidance<sup>1</sup>, payments in respect of each leaseholder from the Fund will need to comply with Subsidy Control requirements. Subsidy is any financial assistance granted by public authorities through State resources on a selective basis to any economic actor (i.e. any entity or group of entities constituting a single economic entity engaged in economic activities in a market) that could potentially distort international trade or investment.

EU State aid rules no longer apply to subsidies granted from 1 January 2021 in the UK, except for aid within scope of the Withdrawal Agreement, including aid under Article 10 of the Northern Ireland Protocol. However, public authorities must comply with our international commitments on subsidies, and in particular the subsidies chapter of the UK-EU Trade and Co-operation agreement (TCA). The maximum amount of de minimis financial assistance (from all UK State resources, including central and local government) that can be provided to any one 'economic actor' under the Subsidy Control Provisions is 325,000 Special Drawing Rights (SDR), approximately £350,000 over a three-year fiscal period, as Small Amounts of Financial Assistance are exempt from the application of the TCA<sup>2</sup>. This includes any funding provided under the Private Sector ACM Cladding Remediation Fund, or the Building Safety Fund.

<sup>1</sup> See here: <https://www.gov.uk/government/publications/private-sector-acm-cladding-remediation-fund-prospectus>

<sup>2</sup> The Trade and Cooperation Agreement expresses the cap as Special Drawing Rights. The sterling equivalent varies from time to time as any currency exchange rate does.

In the context of the funds, 'economic actor' means any leaseholder in the building who uses their property principally for financial gain – for example letting it out or using it for their own business purposes. As commercial tenants by their nature carry out a business activity from their premises these will always be treated as economic actors. Residential leaseholders who only own property in the building which they occupy as their home and do not let it out will not be regarded as economic actors. Leaseholders in the below categories are likely to meet the definition of an economic actor:

- Leaseholders who are incorporated
- Leaseholders who own more than two properties (in any building) unless they are for non-commercial use
- Leaseholders who let out any property in the building
- Leaseholders who otherwise use the leased property only or mainly for commercial purposes.

An economic actor will also include any connected persons. This will include members of group companies and persons having control of corporate entities (including contractual control). If in any doubt about whether a person relates to another for these purposes, please raise the question with the Fund Delivery Partner<sup>3</sup>.

Applicants must take reasonable steps to identify all leaseholders that are economic actors and list them on the Economic Actor Schedule<sup>4</sup> that forms a part of information to be provided to the Fund Delivery Partner and uploaded to their portal. Applicants must send Subsidy Declarations to all economic actors and ask them to complete and return them.

This guidance explains further what should be done at each stage of the application process.

## **Who can make an application to the Fund?**

Applications can only be made by the 'Responsible Entity'. Responsible Entities are those organisations which have a legal responsibility for the repair, condition, and safety of the building, and which have a legal right to recover the cost through the service charge. A responsible entity may be the building freeholder or head leaseholder or a management company that has primary responsibility for the repair of the property. A management company which is not the responsible entity (for example a Managing Agent) will still be able to apply and manage the application as an agent for the responsible entity. Applicants from the social sector, will need to have demonstrated during registration that the costs of remediation are unaffordable or a threat to financial stability.

## **Subsidy Declarations**

As stated above, the beneficiaries of the Fund are leaseholders who would otherwise incur the costs of replacement works of the cladding through the service charge

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<sup>3</sup> The Fund Delivery Partner in London is the GLA and, elsewhere, Homes England

<sup>4</sup> This is a spreadsheet in the prescribed project form which provides details of those leaseholders within the Building that the Applicant knows or reasonably believes to be Economic Actors

provisions in their lease. **In order to meet the requirements of the Fund, an Applicant must:**

- (a) take reasonable steps to identify those leaseholders in the building that are economic actors including from information already in an Applicant's possession and record their details in the Economic Actor Schedule. Indicators that a leaseholder is likely to be an economic actor include the undertaking of commercial activities from premises, ownership of multiple properties, a corporate body (e.g. with Ltd or LLP in its name) or where Applicants write to them at an address different to the premises in respect of which service charge is payable.
- (b) upload the Economic Actor Schedule onto the relevant portal when requested by the Fund Delivery Partner and update the Schedule as needed whenever there is a change of leaseholders (i.e. if the new leaseholder is an Economic Actor) or other information relating to the status of a leaseholder comes into its possession.
- (c) send to each leaseholder a Subsidy Declaration and request that the following leaseholders return them duly completed as soon as possible:
  - (i) – leaseholders of commercial units (e.g. retail, restaurants, cafes, offices etc)
  - (ii) leaseholders of residential units who are 'economic actors' (e.g. buy-to-let landlords) **AND** have received prior financial assistance from the State within the last three years

A template declaration for leaseholders to complete and guidance for leaseholders can be found at

<https://www.gov.uk/guidance/remediation-of-non-acm-buildings>

Applicants should review these documents carefully to ensure they understand what their leaseholders are being asked to do.

- (d) upload completed Subsidy Declarations that it receives from leaseholders onto the relevant portal with the Economic Actor Schedule or (if later) as soon as they are received.

Where an economic actor is a leaseholder of commercial premises (e.g. a shop or office) the Applicant **must** ensure the return of a Subsidy Declaration and its upload onto the relevant portal otherwise no funding will be allocated to those premises.

Where an economic actor is a leaseholder of residential premises then:

- (i) if it is not a Registered Provider (or other provider of social housing) and it has not returned its Subsidy Declaration within 30 days of its receipt by the economic actor concerned, MHCLG will be content to assume that the economic actor has not received any financial assistance from State resources in the current and previous two fiscal years, unless the Applicant knows to the contrary.

- (ii) if it is a Registered Provider (or other provider of social housing), it may be possible to provide funding in excess of the de minimis cap for property used as social housing – see below.

When sending the Subsidy Declaration to economic actors an Applicant must include an explanation that leaseholders that are:

- (a) commercial leaseholders, **or**
- (b) are residential leaseholders who meet the definition of an 'economic actor' and have received state financial assistance within the past 3 years

must sign and return the form to the Applicant. A form of wording to accompany the Subsidy Declaration when sent to leaseholders is included in Annex (i) at the end of this document.

Applicants must **take reasonable steps to identify economic actors and should start distributing and obtaining completed Subsidy Declarations from such leaseholders as soon as you are confirmed eligible for the fund.** If you have already begun collecting information from leaseholders via state aid declarations, these will still be accepted.

You must send a Subsidy Declaration to all leaseholders in your building and there is no need to wait until the costs of the works have been estimated or tendered for, as the declarations only record relevant financial assistance from the State previously received by leaseholders.

As explained in the guidance for leaseholders, residential leaseholders who own a property in the building which they occupy as their home (and do not rent it out) will not need to complete, sign and return a Subsidy Declaration.

### **Who should sign and complete the Subsidy Declaration?**

Leaseholders who are obliged to pay service charge for the costs of remediation need to provide a declaration if:

- They are a leaseholder of commercial premises
- For leaseholders of residential premises, if they meet the definition of an 'Economic Actor' **and** have received financial assistance from the State in the past three years.

Where a lease names more than one leaseholder, each must sign a single declaration, or one may sign on behalf of all leaseholders. Please note that non-Economic Actor leaseholders of residential premises **do not** need to return a Subsidy Declaration.

### **Receiving back completed Subsidy Declarations**

Where an Applicant does not receive back from a leaseholder of residential property a completed and signed Subsidy Declaration within 30 days MHCLG will assume that the leaseholder is not an Economic Actor that has received the benefit of prior financial assistance from the State unless the Applicant knows to the contrary.

An Applicant must ensure that it receives back Subsidy Declarations from commercial leaseholders. If these leaseholders do not provide a declaration, an amount equal to the service charge liability for these leaseholders will be deducted from the funding award.

If at any point during the application process (including after funding is approved) an Applicant does receive a signed and completed declaration back from a leaseholder the Applicant must update the Economic Actor Schedule accordingly and advise the Fund Delivery Partner as soon as possible.

### **Economic Actor Schedule**

Having taken reasonable steps to identify all economic actors in the building and received Subsidy Declarations from relevant leaseholders, these should be used to populate the Economic Actor Schedule.

**Section A** of the schedule should be completed with details of Economic Actors. Each row should include:

- Full name of Leaseholder
- Property type (residential / commercial)
- Building name
- Property address
- The percentage of proposed works cost that is attributable to this property via service charge

Where there are multiple leaseholders of a property, each should be listed on their own row in the schedule.

**Section B** of the schedule should be completed with details of any vacant properties within the building. In this instance, applicants should provide their own details alongside details of the property. Delivery Partners (Homes England / The GLA) will then consider if it would be possible to place a claim for the proportion of the funding claim attributable to those units with the Applicant.

**Section C** of the schedule relates to registered providers (RPs) of social housing or other social housing providers. As with Sections A and B, details of these properties should be provided in the relevant columns, quoting the housing provider's Registration Number with their name where applicable.

Once completed, the Economic Actor Schedule should be uploaded to your Delivery Partner's portal for review when submitting an application for the costs of the full works.

### **Declarations and Subletting**

- Where a private leaseholder owns or leases a number of different units which are sublet, then if each sublease contains an obligation to pay service charge

on a throughput basis, it is each sub-leaseholder who would need to sign a separate Subsidy Declaration if they meet the criteria above.

- Where a leaseholder has further let their property on short terms (for example on an Assured Shorthold Tenancy) where the sub-tenancy would not require the sub-tenant to pay service charge, it will be the leaseholder (not the subtenant) who would need to sign the Subsidy Declaration.
- Where a leaseholder has further underlet their property for a period of more than 7 years this potentially brings the sub-tenancy within the scope of paying service charge and it is possible that the sub-tenant may legitimately be considered the appropriate beneficiary for receiving funding. In this situation this must be on the basis that he/she is required to pay service charge on the same terms as the superior tenant and use their property as their principal dwelling. If applicable, this means that the superior leasehold tenant (here an Economic Actor) should be disregarded for Economic Actor status.
- Where a local authority owns the building or has a lease or leases of units and lets to social housing tenants, then that local authority does not need to complete a Subsidy Declaration.
- Where a Registered Provider of Social Housing (RP) (or other provider of social housing owns the building or has a lease or leases and lets, then it will depend on where the obligation to pay service charge rests:
  - if with the RP or other social housing provider, then it does not need to complete a Subsidy Declaration (funding where an RP or other social housing provider is the beneficiary will be provided via the Services of Public Economic Interest subsidy provisions, rather than TCA subsidy rules);
  - if with a shared ownership leaseholder who has not staircase to 100%, the department will accept that there is no Economic Actor involved and the funding can be attributed to that leaseholder.
  - if with any other leaseholder (e.g. where properties have been sold on open market terms or under Right To Buy/Right To Acquire legislation or leaseholders have staircase to 100%) the leaseholders concerned should be considered in the same way as ordinary residential leaseholders and if they let their property for financial gain (i.e. they rent it out) they would also be considered an Economic Actor for subsidy control purposes.

It is important to note that if any leaseholders are not obliged to pay service charge, then they cannot be beneficiaries under the Funds.

### **Registered Providers (and other providers of social housing)**

Funding in excess of the de minimis cap may be available to RPs and other providers of social housing. If so, it will be necessary to enter a SPEI agreement with the Fund Delivery Partner. This will commit the RP (or other provider) to maintain the affected properties as social housing for a period of 10 years (subject to certain exceptions).

The Economic Actor Schedule asks Applicants to identify affected properties. Applicants should contact the Fund Delivery Partner to discuss applying this approach to individual buildings.

### **Applications approved on or prior to 31 December 2020**

Applications where the award of funding (as stated in the funding award letter) was made prior to 1 January 2021 continue to be bound by the conditions in place at that time. This includes the requirement to provide State aid declarations for all leaseholders who are undertakings (being any leaseholder that uses their property principally for financial gain). The new TCA subsidy rules, including the higher threshold of 325,000 Special Drawing Rights, will apply only to increases in the eligible costs of projects, where the increase is approved after 1 January 2021.

Where leaseholders have previously provided information on previous receipts of subsidy via a State aid declaration, these will continue to be accepted. There is no need for these leaseholders to separately provide a Subsidy Declaration. Similarly, there is no need for applicants who have already submitted details of the leaseholders in a building via a Fund Beneficiary Schedule or Undertaking Summary Spreadsheet to provide further information unless there is a change of leaseholders.

### **Funding Approval & Post-Approval Period**

If the application is successful, then MHCLG and the Fund Delivery Partner will enter into a funding agreement with the Applicant. From this point until the final payments of funds, Applicants will be required to update us with any changes in the leaseholders within the building (e.g. if a leaseholder sells their flat), and to provide an updated Economic Actor Schedule.

Where the anticipated costs of the works increase and exceed the funding agreed, Applicants will need to apply for an increase in funding.

Where a leasehold property is sold during works, the original leaseholder will be treated as the beneficiary for all funding agreed before the date of sale. The new leaseholder who has bought the leasehold interest will only be treated as a beneficiary of financial assistance if any increase in funding is agreed after their date of purchase. In these circumstances, the Applicant must ensure that the new leaseholder (if it meets the criteria above) supplies to the Applicant a signed Subsidy Declaration as their capacity to receive financial assistance will need to be assessed in relation to the additional funding required<sup>5</sup>.

Additionally, where an increase in funding is required further assessment based on the information provided to date will need to be undertaken of the subsidy capacity of those leaseholders who are economic actors to receive an increased funding amount. Applicants should therefore be aware that the impact of the Subsidy Control Provisions and the requirements of this guidance will be relevant in this context and should be considered when making any application for an increase in funding.

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<sup>5</sup> Though as before if a declaration is not received back by the Applicant within 30 days after it has been provided to the new leaseholder MHCLG will assume that the new leaseholder has not received prior assistance from State resources.

Applicants should also be aware that if it turns out that any payments under the Fund would not qualify under the de minimis provisions of the Subsidy Control Provisions, then we may be obliged to withhold or recoup those funds.

### **Annex (i): Suggested wording for communicating requirement for Subsidy Declarations to leaseholders**

A form of wording for Applicants to send out to leaseholders with the template Subsidy Declaration for completion is set out below:

Dear Leaseholder,

For us to access the [Private Sector ACM Cladding Remediation Fund / Building Safety Fund, you will need to review the [attached/enclosed] document, called the "Subsidy Declaration". Certain leaseholders must sign and return this declaration to us to be able to have some or all their service charge contribution for the cladding works covered by the Fund.

Not all leaseholders will need to fill this declaration in, but you must read it carefully before deciding whether it applies to you or not.

As explained in the Subsidy Control Guidance for Leaseholders<sup>6</sup>, residential leaseholders who own a property in the building which they occupy as their home (and do not rent it out) **do not** need to complete, sign and return a Subsidy Declaration.

Only leaseholders who meet the below criteria need to complete and sign the Subsidy Declaration, and return it to us [refer to contact details]:

- All leaseholders of commercial premises
- All leaseholders of residential premises who are 'economic actors' **and** have previously received financial assistance from the State in the current and previous two accounting years.

A leaseholder will be an economic actor where they use their property mainly for financial gain - for example letting it out or using it for their own business purposes. This will typically include:

- Leaseholders who are incorporated
- Leaseholders who own more than two properties (in any building) unless they are for non-commercial use
- Leaseholders who let out any property (residential or commercial) in the building for financial gain.

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<sup>6</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/905513/State\\_Aid\\_Guidance\\_for\\_Leaseholders\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/905513/State_Aid_Guidance_for_Leaseholders_.pdf)



Leaseholders that are also economic actors should note that the following will apply to funds received from the Fund to cover their service charge contribution:

- there is a limit on the amount of service charge they can be relieved of in respect of these works. That is the approximately £335,000 maximum allowance permitted under the Trade and Cooperation Agreement between the UK and the European Union. This is calculated taking account of any other financial assistance from the State under any de minimis regime received by that leaseholder over the current and two previous accounting years: and
- where leaseholders have previously received subsidy during the reference period (i.e. in the current or previous two accounting years) this must be declared, and the leaseholder will be permitted to take advantage of any unused part of the allowance. Further information is available in the Subsidy Control guidance for leaseholders.

Yours sincerely,

[Applicant Name]